

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
Rules and Regulations Implementing the)	CG Docket No.
02-278		
Telephone Consumer Protection Act of 1991)	CC
Docket No. 92-90		
)	
)	

To: The Commission

**COMMENTS OF MARC A. RESSLER
22 November 2002**

Background:

1. I am a resident of the state of Maryland. A number of years ago I had complained to friends about my frustration in dealing with unwanted advertising in the form of junk mail, junk e-mail, and those annoying dinnertime telephone solicitations - especially those involving pre-recorded messages. I was informed that the FCC had passed an anti-"junk fax" law that provided protections for individual citizens as well. I was thrilled and ran off to find out about 47 USC 227. I read the statute as well as information available from a number of web sites about what my rights were and created a form to use as a log to query those unknown callers about who they were, who they represented, whether they had a do not call list, whether they had a written do not call policy, etc. I thought this would serve as legal record for what I thought would forever rid me of this annoyance.

2. To my surprise, when I called the FCC to ask about enforcement, I first discovered that it was hard to find who to talk to in the first place, only to discover that once I had the right bureau, that I would need to take legal action myself, or get my state's Attorney General to do it. The Attorney General's office directed me to the Consumer Affairs division, where I pretty much found I was on my own. This was repeated with Attorneys General and consumer fraud groups in a number of other states, always with the response that this was either a federal matter or one I would have to deal with individually. I was willing to continue keeping records and requesting that I be put on do-not-call lists, but I never wanted to put the time and energy into a small-claims court case. I know, and the record reflects, that others have - with limited success. I must assume that there are a large number of people like me that have a similar frustration.

3. Thus, I was gladdened to find that the TCPA was being revisited, and even better, there was an Enforcement Bureau now and it was actually holding some questionable practitioners to account. I would therefore like to convey my experiences in the past and respond to some of the issues and questions set forth by the Commission in this NPRM.

The Past:

4. There is no doubt that the TCPA had an effect on telephone solicitation at my residence. The most immediate effect being a virtual elimination of all forms of pre-recorded messages, many of which were designed to be questionnaires that would not release a phone line until at least the pause for the next response - if then. Most national telemarketers were well trained in the requirements of the law, giving their full names as well as the name and phone number of the entity they represented. A number of them even had written do-not-call (DNC) policies, although some of the ones I received looked as though they might have been whipped up on the spur of the moment.

5. The same cannot be said for all telemarketers, and especially local telemarketers or small companies doing their own phone advertising. Often I was given a first name only, and when I asked for a supervisor I would often be hung up on, or find the supervisor as ignorant the original caller. I have had telemarketers yell at me, refuse to provide me information, and slam the phone down on me. How is one to get on a DNC list when you can't even get the number of the company that called? This was another problem, and one that has only gotten worse, and that is the lack of a manner of contacting the source of these calls. Most telemarketers either do not send the appropriate codes or block the caller ID feature so that a *69 query results in a "...this number is not in our dialing area" response from the service provider. This only increases the level of frustration of the consumer.

6. My experience has been that company DNC lists often work, as the volume of unsolicited calls had decreased for a number of years, and certainly the DMA op-out helps as well. However, this is not always the case. My records show return calls from not only the same entity, but also the same corporate telemarketing company (although different offices, they were all considerate enough to tell me what city they were calling from) in the period of a year. This might be expected if it had happened in the 60-90 days the company said it might take to update all the computer records, but these events were more than 90 days apart. What was truly annoying in this case was that I had the written DNC policy of the requesting entity as well as that of the telemarketing firm. This is unusual, as many telemarketing firms will not guarantee to crosscheck their records across clients and have told me that their lists are client specific.

The Present

7. I am sad to report that in the last few years things have gotten worse. The use of predictive dialers have led to a regular routine of "dead air" on the phone, only to be followed by a click or a delay until a telemarketer has been found to field the call. This also results in a large number of answering machine "messages" that are nothing more than " [dead air] - click" . The only thing more annoying is the dead air - pre-recorded message scenario. In this case I assume that the telemarketer is avoiding the letter of the law restriction against an automatic dialer "initiating" a pre-recorded message, although I have no way of telling whether a human or a machine started the recording. To add to this insult, the pre-recorded message gives you an 800 number to call, only to discover that this often provides nothing more than a pre-recorded message advertising the product. Avoiding the letter of the law seems to be the goal of another group of callers, typically local businesses offering "free estimates or evaluations" . These are thinly disguised advertising ploys that are designed to skirt the requirements of the TCPA. This is only more evident when the caller responds with "but I'm not selling anything" , only to later reveal that, yes, they have a DNC list and you can be put on it.

8. I would hope that a National DNC list, enforced by someone other than consumers, might actually stand a chance of working. How it might be split between the FTC and FCC is not obvious if the FTC actually plans to limit this to a trial period. Certainly a number of people are concerned about what will happen to state DNC lists based on the filings in this proceeding by resident of Indiana. It would seem that regardless of what state criteria exist, that those people who have declared themselves to opt-out of telemarketing by signing up for a state DNC would be thrilled if their numbers were included on a national data base. It would seem a simple approach would be to merge the state DNC lists into the national list, while remaining to allow the states to oversee their individual lists and the laws and prosecution of intrastate violations. Certainly a National list would eliminate the problem of calling a company to find out why they called you again since you are supposed to be on their DNC list. Try to find someone who actually knows how the DNC list works for his or her company or to be able to check and see if you are actually on it - this seems to be a daunting task - they only know how to "put you on the list" .

9. With regard to *Central Hudson*, I fully admit I am not a lawyer, however, the issue of narrowness in regards a National DNC list should be obvious. It is narrow with respect to the individual citizen. It is not the government who is restricting anything - it is I. The fact that I have a telephone in my home to provide **me** with communications to the outside world does not convey the authority to invade my home to someone who may be at the other end of the line. Public speech is not private speech. You cannot enter my property without my permission - except it would seem, through

the telephone. In *Rowan v. United States Post Office Department*, the Supreme Court upheld a challenge to a federal law that provides mail recipients with a procedure to protect themselves from offensive junk mail advertisements (basically by declaring them to be obscene material). Chief Justice Berger, writing for the Court, noted that the right to communicate must be placed in the scales with every person's right "to be let alone". The Court concluded that "a mailer's right to communicate must stop at the mailbox of an unreceptive addressee." Why doesn't this ruling therefore apply in this case, where the homeowner has taken an affirmative action to deny electronic access to the caller? The Court said to not uphold such a statute would essentially license a form of trespass.

10. The definition of what is an automatic dialer must be updated to include current and future automation approaches for the telemarketing business. There is no reason to expect that a clever marketer won't immediately bypass an overly restrictive definition. Another problem in the definition is that of the "existing business relationship". As a consumer, I have no idea what restrictions if any this imposes, yet as a consumer I will not be surprised by my bank calling me to offer me a new home loan - but I will be upset when they or a credit card company starts calling to offer me life insurance, which seems to be the latest dodge around the rules. A query as to "existing business relationship" brought forth the response that the life insurance offer was being made by a separate company - it was they that had an "existing business relationship" with the financial institution.

11. The current law requires that faxes provide identifying information on them, yet telemarketers running predictive dialers are not required to provide any form of identification, and in fact, do the best to disguise their point of origin. When I get two or three dead calls in a day, I start to wonder if someone is staking out my home, trying to determine if anyone is there. At the very least this amounts to a form of harassment - but one in which I cannot determine who is at fault. I believe there is state law that covers harassing and threatening phone calls, but how do I determine the nature of these "non-calls". Regulations need to address this most annoying of the recent crop of telemarketing approaches. Time is money for these people, but when I am working at home, who pays for my lost time?

Thank you for your consideration,
Marc A. Ressler